

House Engrossed Senate Bill

FILED

**JANICE K. BREWER
SECRETARY OF STATE**

State of Arizona
Senate
Forty-eighth Legislature
First Regular Session
2007

CHAPTER 103

SENATE BILL 1310

AN ACT

AMENDING SECTIONS 49-1019 AND 49-1052, ARIZONA REVISED STATUTES; RELATING TO
UNDERGROUND STORAGE TANKS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 49-1019, Arizona Revised Statutes, is amended to
3 read:

4 49-1019. Release of regulated substance; causes of action;
5 limitation; liability

6 A. Any one of the following persons may bring an action in superior
7 court against a person who caused or contributed to the release of a
8 regulated substance from an underground storage tank to require that person
9 to reimburse one of the following persons for the reasonable costs of
10 corrective actions taken in response to the release:

11 1. An owner or operator of an underground storage tank or any other
12 person who takes a corrective action pursuant to section 49-1005.

13 2. An owner or operator of an underground storage tank or any other
14 person from whom costs are recovered by this state pursuant to section
15 49-1017 or 49-1017.01.

16 B. The person seeking reimbursement has the burden of demonstrating
17 that the corrective action costs incurred were reasonable.

18 C. This article does not affect or modify the obligations or liability
19 of a person, by reason of subrogation or otherwise, under any other provision
20 of common law, federal law or the laws of this state, for damages, injury or
21 loss resulting from a release of a regulated substance or for the costs of a
22 corrective action, except that a person who receives compensation for the
23 costs of a corrective action pursuant to this article is precluded from
24 recovering compensation for the same corrective action costs pursuant to any
25 other federal law or the laws of this state. A person who receives
26 compensation for corrective action costs pursuant to federal law or the laws
27 of this state is precluded from receiving compensation for the same
28 corrective action costs as provided in this article.

29 D. Liability under this section shall be equitably allocated on a
30 case-by-case basis in accordance with section 49-1017, subsection D. Any
31 party authorized to bring an action pursuant to subsection A of this section
32 and any party against whom an action is brought may have liability allocated
33 through mediation in accordance with section 49-1017, subsection D or through
34 the informal appeal process in accordance with section 49-1091.

35 E. The department may take corrective action for a release and recover
36 direct costs pursuant to section 49-1017 in proportion to the allocation made
37 pursuant to subsection D of this section if an owner or an operator does not
38 perform all necessary corrective actions and there is no other person to
39 perform corrective actions pursuant to section 49-1052, subsection I. An
40 owner or an operator is eligible for ~~one hundred~~ NINETY per cent coverage
41 from the assurance account for reasonable and necessary eligible costs above
42 those for which ~~they are~~ THE OWNER OR OPERATOR IS liable if ~~they elect~~ THE
43 OWNER OR OPERATOR ELECTS to perform corrective action which exceeds ~~their~~ THE
44 allocated share of liability.

1 Sec. 2. Section 49-1052, Arizona Revised Statutes, is amended to read:
2 49-1052. Coverage of corrective action costs
3 A. The department shall provide from the assurance account coverage in
4 the amounts authorized by subsection I of this section and sections 49-1017,
5 49-1022 and 49-1054 of the costs incurred after September 15, 1989 of the
6 following:
7 1. Sampling, analysis and reporting THAT ARE initiated pursuant to
8 section 49-1004 AND that ~~confirms~~ CONFIRM the presence of a release that
9 requires corrective action pursuant to section 49-1005.
10 2. Sampling, analysis and reporting THAT ARE initiated pursuant to
11 section 49-1008 AND that ~~confirms~~ CONFIRM the presence of a release that
12 requires corrective action pursuant to section 49-1005.
13 3. Permanent closure pursuant to section 49-1008 before July 1, 1999,
14 if the owner or operator satisfies both of the following requirements:
15 (a) A release associated with the tank being closed was reported to
16 the department.
17 (b) The closure of the tank met all applicable closure requirements of
18 section 49-1008 and rules adopted pursuant to that section.
19 4. Permanent closure of a tank pursuant to section 49-1008 on or after
20 July 1, 1999, if the owner or operator satisfies all of the following
21 requirements:
22 (a) The closure of the tank meets all applicable closure requirements
23 of section 49-1008 and the rules adopted pursuant to that section.
24 (b) A release to native soils was confirmed and reported to the
25 department before closure activities were initiated.
26 (c) The source of the release is the tank that is being closed.
27 (d) The tank that is being closed met the temporary closure
28 requirements or the new or upgraded tank requirements in rules adopted
29 pursuant to section 49-1014 at the time of the release.
30 (e) The tank cannot be repaired under the rules adopted pursuant to
31 section 49-1014.
32 5. Corrective actions initiated pursuant to section 49-1005.
33 6. Permanent closure pursuant to section 49-1008, for persons
34 described in subsection I of this section, if all of the following are met:
35 (a) The underground storage tank being closed is the source of a
36 release to native soil that requires corrective action.
37 (b) Permanent closure of the underground storage tank met all of the
38 applicable closure requirements of section 49-1008 and the rules adopted
39 pursuant to that section.
40 (c) A release to native soil associated with the underground storage
41 tank being closed was reported to the department.
42 (d) The person described in subsection I of this section meets the
43 requirements of section 49-1016, subsection C.

1 7. Costs incurred for professional fees directly related to the
2 preparation of an assurance account application. The department shall credit
3 these fees toward the applicant's copayment obligation.

4 B. The department may provide the coverage required by this section
5 either by paying the owner, the operator or a designated representative of
6 the owner or operator or any combination of these persons or a political
7 subdivision covered by subsection H of this section or by making direct
8 payments for eligible actions on behalf of the owner, operator or political
9 subdivision. If the department determines that an application for direct
10 payment or reimbursement is incomplete, the department within forty-five days
11 of the application shall notify the owner or operator of the missing
12 information as specifically as possible and shall permit the owner or
13 operator to provide the additional information within thirty days. On the
14 request of an applicant, the department shall grant an additional sixty days
15 to submit the missing information. The grant of additional time tolls the
16 period for making an interim determination on matters relating to direct
17 payment or reimbursement pursuant to section 49-1091.

18 C. An owner, an operator, a designated representative of an owner or
19 operator or a political subdivision covered by subsection H of this section
20 may apply to the department for coverage of the eligible costs pursuant to
21 this article and rules adopted pursuant to this article. Any employee of the
22 owner or operator may submit an application to the department on behalf of
23 the owner or operator.

24 D. The department shall not pay for eligible costs unless the
25 department determines that the eligible activities have met, or when
26 completed will meet, the applicable requirements of section 49-1004 or
27 49-1005. The department may require by rule that persons who perform payable
28 eligible activities meet specified standards of qualification and be approved
29 by the department.

30 E. The department shall not provide any coverage described in this
31 article to an owner or operator of underground storage tanks described in
32 section 49-1031, subsection C. The department shall not provide any coverage
33 described in this article with respect to the substances described in section
34 49-1031, subsection C, unless the tax imposed by article 2 of this chapter
35 applies to such substances.

36 F. The department shall not provide any coverage described in this
37 article to an owner or operator or any person or entity employed or retained
38 by an owner or operator, if any of the following applies:

39 1. The owner or operator is delinquent in the payment of any fee,
40 penalty or interest thereon imposed under this chapter and fails to cure that
41 delinquency within thirty days after receiving notice from the department.
42 If the owner or operator cures the delinquency more than thirty days after
43 receiving notice from the department, the owner or operator may submit a new
44 application for coverage. The new application shall be prioritized for
45 review and payment in the ordinary course of ranking. If the owner or

1 operator cures the delinquency within thirty days after receiving notice from
 2 the department, the owner or operator retains the owner's or operator's place
 3 in the priority system. The department shall provide notice of the
 4 delinquency within thirty days after receiving an application for payment
 5 from the assurance account or within sixty days after a work plan is
 6 submitted for preapproval. If the department does not provide notice
 7 pursuant to this paragraph, the department shall not withhold payment based
 8 on that delinquency nor shall the department use that delinquency as a basis
 9 for the department to delay preapproval of corrective actions and related
 10 costs. An owner or operator remains eligible for coverage for other
 11 underground storage tank sites if no fees, penalties or interest is
 12 delinquent for those sites.

13 2. The owner or operator is delinquent in filing any excise tax return
 14 required by section 49-1032, subsection B and fails to cure that delinquency
 15 within thirty days after receiving notice of the delinquency from the
 16 department. If the owner or operator cures the delinquency more than thirty
 17 days after receiving notice from the department, the owner or operator may
 18 submit a new application for coverage. The new application shall be
 19 prioritized for review and payment in the ordinary course of ranking. If the
 20 owner or operator cures the delinquency within thirty days, after receiving
 21 notice from the department, the owner or operator retains the owner's or
 22 operator's place in the priority system. The department shall provide notice
 23 of the delinquency within thirty days after receiving an application for
 24 payment from the assurance account or within sixty days after a work plan is
 25 submitted for preapproval. If the department does not provide notice
 26 pursuant to this paragraph, the department shall not withhold payment based
 27 on that delinquency. The department shall not use a delinquency pursuant to
 28 this paragraph as a basis for the department to delay preapproval or
 29 corrective actions and related costs.

30 3. The underground storage tanks included in the application for
 31 coverage are located at a site that is the subject of an enforcement
 32 proceeding under section 49-1013. The owner or operator remains eligible for
 33 coverage for other sites where underground storage tanks are located if the
 34 owner or operator is not the subject of an enforcement proceeding regarding
 35 those sites. Payment from the assurance account will be withheld during the
 36 time that a final compliance order is in effect only for those costs directly
 37 associated with those activities that are the subject of the compliance
 38 order. Any payment costs that are incurred prior to a compliance order
 39 becoming final and that are not directly associated with the subject of that
 40 compliance order shall be eligible for payment pursuant to this section.
 41 Processing of payment from the assurance account shall not be delayed until a
 42 compliance order becomes final. An owner or operator shall not be considered
 43 to be the subject of an enforcement proceeding for purposes of eligibility
 44 for assurance account payments if any of the following applies:

1 (a) The department has filed an action in superior court unless the
2 court determines in its discretion on the merits of the action that
3 withholding payment is an appropriate sanction. Processing of payment shall
4 be postponed until the court determines the owner's or operator's
5 eligibility.

6 (b) The department takes corrective actions pursuant to section
7 49-1017, subsection A, paragraphs 1 and 2, without the consent of the owner
8 or operator.

9 (c) An owner or operator formally consents in writing to an
10 administrative order. If the department determines that the owner or
11 operator is in violation of the consent order, the owner or operator shall
12 not be considered to be subject to an enforcement proceeding and processing
13 of payment from the assurance account shall not be delayed until a final
14 administrative decision is rendered finding that the owner or operator is in
15 violation of the consent order. Payment from the assurance account shall be
16 withheld only for those costs determined in the final administrative decision
17 to be incurred for those activities that are the direct subject of the
18 determined violation of the consent order. Any other payment costs that are
19 incurred prior to a final administrative decision finding a violation of the
20 consent order or payment costs that are not the direct subject of the consent
21 order violation shall be eligible for payment pursuant to this section. For
22 compliance orders and violated consent orders that become final on or before
23 November 1, 2000, on satisfaction of a final compliance order or a final
24 administrative decision on a violated consent order, an owner or operator
25 regains eligibility of coverage for costs incurred for activities that are
26 the subject of the final compliance order or final violated consent order.
27 For compliance orders and violated consent orders that become final after
28 November 1, 2000, an owner or operator regains coverage for costs incurred
29 for activities that are the subject of the final compliance order or final
30 violated consent order, except that the director may withhold coverage of up
31 to twenty-five per cent of the eligible costs incurred for activities that
32 are performed to cure the violation and that gave rise to the final
33 compliance order or final violated consent order if the owner or operator has
34 not demonstrated good faith attempts to meet the requirements of the final
35 compliance order or to correct the violation of the consent order. Any
36 decision by the director to withhold coverage under this subdivision is an
37 appealable agency action.

38 4. An individual, an owner or operator or any entity seeking coverage
39 is convicted of fraud relating to performance of eligible activities or to
40 any claim made for payment from the assurance account. This paragraph
41 applies only to the individual, the owner or operator or the entity that is
42 actually convicted of fraud relating to a corrective action or to a claim
43 made for payment.

1 5. The owner or operator has failed to comply with the financial
2 responsibility requirements of 40 Code of Federal Regulations part 280,
3 subpart H with respect to the underground storage tanks included in the
4 application for coverage and all of the following conditions are met:

5 (a) On or after July 1, 1996, the person seeking coverage is an owner
6 or operator of the tank.

7 (b) As of July 1, 1996, there are no preexisting conditions precluding
8 the ability to obtain financial responsibility which would have covered the
9 release.

10 (c) The release is reported on or after July 1, 1996.

11 (d) The owner or operator fails to provide information to refute both
12 of the following conditions:

13 (i) The tank was not pumped before July 1, 1996 for the purposes of
14 removing free product.

15 (ii) Regulated substances were placed in or dispensed from the tank on
16 or after July 1, 1996.

17 The owner or operator remains eligible for coverage for other sites where the
18 owner or operator has complied with the financial responsibility requirements
19 of this paragraph. The conditions described in subdivision (d) of this
20 paragraph shall not apply to releases reported after January 1, 2000.

21 G. The department shall establish criteria for determining priorities
22 among the applications for coverage under this article. The criteria shall
23 include:

24 1. The need for financial assistance. The financial need evaluation
25 shall include the owner's or operator's corrective action liabilities at all
26 of the owner's or operator's underground storage tank sites in the state.

27 2. The risk to human health and the environment.

28 3. Whether the coverage is provided as a direct payment to a person
29 performing an eligible activity.

30 4. The extent to which a delay in providing coverage will affect an
31 eligible activity in progress.

32 5. The date on which an application for coverage is made.

33 6. The date on which an eligible activity for which coverage is sought
34 is to be or was taken.

35 7. Whether the payment has been previously deferred because of
36 insufficient monies in the assurance account and, if deferred, the length of
37 such deferral.

38 H. The department may provide the coverage described in this article
39 for eligible activity costs incurred by a political subdivision with respect
40 to a release from an underground storage tank if the underground storage tank
41 or the property where the underground storage tank is located comes into the
42 possession or control of the political subdivision under either title 12,
43 chapter 8, article 2 or 3.

1 I. The department may provide the coverage described in this article
2 for eligible activity costs with respect to a release from an underground
3 storage tank incurred by a person who currently owns the property or a person
4 with principal control of the property on which the underground storage tank
5 is or was located or the underground storage tank and who undertakes to meet
6 the requirements of section 49-1005, but who is not an owner or operator.
7 For claims paid on or after ~~the effective date of this amendment to this~~
8 ~~section~~ AUGUST 25, 2004, a person who undertakes to meet the requirements and
9 who is not an owner or an operator is eligible for ninety per cent coverage,
10 except that if the ten per cent per application that is not covered exceeds
11 the assessed valuation of the real property, the person is eligible for one
12 hundred per cent coverage in an application. If that person is not eligible
13 for one hundred per cent coverage and does not pay the ten per cent remaining
14 and notwithstanding the limitations prescribed in section 49-1017, the
15 department shall take corrective action with respect to that release. A
16 person who takes corrective action pursuant to this subsection shall submit
17 certification to the department that the person has paid the remaining costs
18 or has agreed to pay those remaining costs as demonstrated in an existing
19 agreement.

20 J. Subject to section 38-503 and other applicable statutes and rules,
21 the department may contract with a private consultant for the purpose of
22 assisting the department in reviewing work plans, site characterization
23 reports, corrective action plans, monitoring reports and other information to
24 determine whether corrective actions meet the criteria and requirements of
25 this chapter and the rules adopted by the director. If the department
26 contracts with a consultant pursuant to this section, an owner or operator
27 may request that the department expedite the review or inspection process by
28 requesting that the department use the services of the consultant and by
29 agreeing to pay to the department the costs of the consultant's services.
30 The department shall not use a private consultant if the fee charged for that
31 service would be more than the fee the department would charge to provide
32 that service. The department shall pay the consultant for the services
33 rendered by the consultant from fees paid by the applicant to the department
34 pursuant to this section.

35 K. Claims for coverage that are not paid within one hundred eighty
36 days after receipt by the department of a complete and correct claim accrue
37 interest at the rate of eight per cent per year. Interest shall not accrue
38 on any claim that is unpaid as a result of insufficient monies in the area
39 account for that claim.

40 L. Requests by the department for additional information from
41 claimants shall be reasonably related to the determination of the validity of
42 the claim as prescribed by this article.

43 M. Except for claims for appeals costs authorized pursuant to section
44 49-1091.01, claims for coverage, or a work plan for preapproval, at a site
45 shall be submitted to the department no more than one year after the claimant

1 receives a closure letter sent by the department by certified mail with
2 notice that the claimant has one year to submit a claim for that release. If
3 the claim is submitted in a timely manner, the claimant may correct or
4 supplement the claim within a reasonable time as specified by the department
5 without loss of coverage. If a work plan is submitted in a timely manner,
6 the claimant, at any time thereafter, may correct, supplement or resubmit the
7 work plan. Failure to submit a timely claim or work plan shall result in
8 denial of the claim. Any monies encumbered or set aside regarding the claim
9 shall be returned to the assurance account, except for those monies
10 encumbered or set aside for the purpose of well abandonment or site
11 restoration. The time limit prescribed by this subsection does not apply to
12 closed releases that are subsequently reopened for the performance of
13 additional corrective actions or at which corrective actions are proceeding
14 pursuant to a work plan for preapproval submitted before the release was
15 closed.

16 N. The department shall provide coverage for the costs of corrective
17 actions relating to soil remediation that are consistent with remediation
18 standards developed pursuant to chapter 1, article 4 of this title. Payment
19 may be made for the most cost-effective corrective actions to remediate soil
20 either to the predetermined residential soil clean up levels or site specific
21 residential soil clean up levels for unrestricted use of the property as
22 determined by a risk based health assessment performed pursuant to rules
23 adopted pursuant to article 1 of this chapter. The department shall provide
24 coverage for the costs of corrective actions relating to groundwater
25 remediation and for approved corrective action plans that are submitted on or
26 after ~~the effective date of this amendment to this section~~ AUGUST 25, 2004
27 and for work plans that are associated with an approved corrective action
28 plan that is submitted to the department on or after ~~the effective date of~~
29 ~~this amendment to this section~~ AUGUST 25, 2004, and payment shall be made
30 only for the most cost-effective risk based corrective action in accordance
31 with rules adopted under article 1 of this chapter. On adoption of rules and
32 after a request to the department, the department shall issue a no further
33 action letter on completion of source removal and source control and approval
34 of a groundwater monitored natural attenuation corrective action plan. The
35 department shall provide coverage for corrective actions related to the
36 control and removal of a source of contamination but shall not provide
37 coverage for permanent closure of an underground storage tank. A source of
38 contamination includes any one or more of the following:

39 1. Free product.

40 2. A regulated substance present in soil that causes or threatens to
41 cause an exceedance of the aquifer water quality standards.

42 3. A regulated substance present in groundwater at levels that would
43 prevent timely reduction of contaminant concentrations in comparison with the
44 performance of active remediation.

1 4. Any other presence of a regulated substance causing an ongoing
2 source of contamination, as determined by the department.

3 0. If a person intends to seek payment from the assurance account, the
4 corrective action selected in a corrective action plan shall be the most
5 cost-effective alternative that meets the requirements of section 49-1005.
6 Monies from state appropriations shall not be used for administrative costs.
7 If the most inexpensive corrective action alternative is not selected, the
8 person shall demonstrate to the department the criteria supporting the
9 corrective action selected in the corrective action plan. Nothing in this
10 subsection shall affect the department's review of corrective action costs
11 pursuant to article 3 of this chapter.

12 P. The coverage provided by this section is available only to the
13 extent of the monies available in the assurance account. If there are
14 insufficient monies available in the assurance account to pay all eligible
15 costs which the department has determined should be paid, the department
16 shall defer such payment until sufficient monies are available to pay such
17 eligible costs. The department shall not provide any coverage and the
18 assurance account is not liable for compensating third parties for bodily
19 injury or property damage caused by releases from underground storage tanks.

20 Q. ~~From and after December 31, 2005,~~ The department shall not accept
21 an application to the assurance account FOR COVERAGE FROM AN APPLICANT FOR
22 COSTS ASSOCIATED WITH A SINGLE FACILITY MORE FREQUENTLY THAN ONCE EACH
23 CALENDAR MONTH AND THE DEPARTMENT SHALL NOT ACCEPT AN APPLICATION FOR COSTS
24 ASSOCIATED WITH A SINGLE FACILITY for an amount of less than five thousand
25 dollars unless any of the following applies:

26 1. The reimbursement or preapproval application is the final
27 application associated with the release.

28 2. The application for direct payment is the final application
29 associated with the preapproved work plan.

30 3. The application is the last application submitted by that applicant
31 on or before June 30, 2010.

APPROVED BY THE GOVERNOR APRIL 18, 2007.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 18, 2007.